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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CRAIG LAMONT JOHNSON,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Real Party in Interest.

G040227

(Super. Ct. No. 06SF0996)

O P I N I O N

Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Everett W. Dickey, Judge (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.). Petition granted.

Deborah A. Kwast, Public Defender, Thomas Havelena, Chief Deputy Public Defender, Kevin J. Phillips and Darren L. Thompson, Deputy Public Defenders for Petitioner.

No appearance for Respondent.

Tony Rackauckas, District Attorney, and Craig McKinnon, Deputy District Attorney, for Real Party in Interest.

* * *

Petitioner, Craig Lamont Johnson, is charged in an information with possession of marijuana for sale. The trial court denied his motion to traverse the search warrant on the basis that he failed to make a sufficient offer of proof to be entitled to a hearing under *Franks v. Delaware (Franks)* (1978) 438 U.S. 154. Although Johnson filed this petition seeking relief on the basis that he was prevented from presenting live testimony to support his offer of proof, we grant the petition on the basis that the offer of proof actually provided to the trial court was sufficient to be entitled to a *Franks* in camera hearing.

FACTS

Investigator F. Prado of the Orange County Sheriff's Department prepared a sworn affidavit in support of a warrant to search the residence at 32 Sage Brush. In the affidavit, Prado stated he received a tip from two different informants that on a daily basis, young adults enter the residence at 32 Sage Brush and then leave the residence moments after entering. The informants described the residents at 32 Sage Brush as a black man, a black woman, and two small children.

Believing that criminal activity may be occurring at the residence, Investigator Prado and several members of the Sheriff's Narcotic Detail watched the residence on Sage Brush. After ten minutes, the officers observed several young men arrive at the residence in a small pickup truck. When the men left, they were followed and detained when Deputy Finley conducted a traffic stop. During the detention, Finley searched the truck and the three occupants and discovered 26 grams of marijuana.

According to Prado's affidavit, about 20 minutes later, he "assisted Dep. J. Finley with the subjects he had stopped coming from 32 Sage Brush." According to Prado, he spoke to two of the three men in the truck, and they told him that they had purchased the marijuana from a black man at 32 Sage Brush for \$100. According to the affidavit, the two men also told Prado they saw additional marijuana inside the residence on Sage Brush and they had purchased marijuana from the same man in the past.

According to the affidavit, about an hour after the truck with the three men stopped at the residence, another man drove up and entered the residence on Sage Brush. After the man left the residence, he was also detained during a traffic stop. According to Prado, the man, later identified as Avetis Mike Militonnyan, was questioned by Investigator Catalano during the traffic stop and he was told about the ongoing investigation at the residence on Sage Brush. According to Prado, Militonnyan was also in possession of marijuana, and according to Prado's affidavit, Militonnyan told Catalano that he purchased the marijuana from "Craig" at the address on Sage Brush, and that he would warn "Craig" about the investigation.

About an hour after Militonnyan left the residence, Prado and other officers entered the residence "to prevent the possible sales/destruction of evidence." Once inside, they smelled the odor of marijuana, saw a digital scale and three bags of marijuana, and encountered Johnson, his wife, and two children. Based on his observations at the residence and the information he received from the traffic stops, Prado obtained and executed a search warrant at 32 Sage Brush and arrested Johnson for possession of marijuana for sale.

Based on discrepancies between Prado's affidavit, and Finley and Catalano's police reports, counsel filed a motion to traverse the search warrant. Attached to the motion were counsel's declaration, Militonnyan's declaration, and the police reports prepared by Finley and Catalano. In addition to the declarations and police reports, counsel also subpoenaed Finley, Catalano, and Militonnyan to testify as an offer of proof

that Prado included materially false information in the affidavit. In the motion, Johnson alleged that Prado's affidavit contained false statements that are material to the probable cause finding, and if the statements are excised from the affidavit, there is insufficient probable cause to support issuing the search warrant.

In support of the motion, Johnson specifically alleged that Prado intentionally misrepresented the fact that he personally interviewed two of the occupants of the pickup truck detained by Deputy Finley. According to Finley's report, it was Deputy Couey who arrived to assist with the traffic stop. According to counsel, Finley's report omits any reference that Prado ever arrived, assisted, or interviewed any of the men detained during the traffic stop. According to Finley's report, he searched all three individuals, Delrio, Salazar, and Nelson, and only Nelson was in possession of marijuana. According to Finley, he also interviewed all three individuals, and contrary to Prado's claim that two of the occupants stated they purchased marijuana from a black man at the residence at 32 Sage Brush, only Nelson admitted that he knew where he purchased the marijuana and he stated that he purchased it from a person who lives in Wagon Wheel for \$100. According to Johnson, Prado never interviewed the occupants of the pickup truck during the traffic stop, and after the detention was over, Finley cited Nelson for possession of marijuana, and all three individuals were "released at the scene" without ever implicating Johnson or anyone else at the residence on Sage Brush.

Johnson contends that Prado also misrepresented facts about Militonnyan's detention as well. According to Catalano's report, after Militonnyan consented to a search, two baggies of marijuana were discovered in his car. According to Catalano, Militonnyan told him that one of the baggies was his and that he purchased the other bag for a friend. Contrary to the claims made in Prado's affidavit, Catalano's report never indicated that Militonnyan named or described the person or the location where he purchased the marijuana found in his car, or that he intended to warn Johnson about the ongoing investigation occurring outside of his residence.

Johnson also provided the trial court with Militonnyan's declaration prepared under penalty of perjury in which he explained his encounter with Investigator Catalano. According to Militonnyan, he never said that he purchased marijuana from Johnson, he never said where he purchased the marijuana found inside his car, he never made any statements that identified Johnson or that would lead officers to believe that Johnson was selling marijuana, and he never said that he was going to warn Johnson about the ongoing surveillance at his residence. According to Militonnyan, when he was stopped, the officers told him they were going to detain him so that he couldn't warn Johnson about the investigation.

Based on the motion and the documents filed in support of the motion, the trial court stated the offer of proof for a *Franks* hearing was "woefully inadequate." The trial court explained why the offer of proof was inadequate and said, "There's [sic] only two affidavits. And one's from defense counsel and the other is from Militonnyan. . . . He's found with marijuana in his car, and he's complaining about the fact that the police detained him for several hours. And the police report shows that they recommended that he be prosecuted for the marijuana found in his car. So, obviously, he would not like the police. He's clearly a biased witness." The trial court denied the motion stating, "I'll deny [the motion] for lack of a sufficient offer of proof under *Franks versus Delaware*, lack of a substantial preliminary showing necessary to have a hearing."

Johnson filed this petition complaining that he was prevented from calling witnesses as part of his offer of proof to be entitled to a *Franks* in camera hearing. In reply, the district attorney argues Johnson was not entitled to call witnesses because *Franks* requires that the preliminary prima facie showing must be made by written declarations or affidavits and therefore the trial court made the correct ruling based on Johnson's deficient offer of proof. We issued an order to show cause and held oral argument.

DISCUSSION

The facts challenging the veracity of the affiant in this case are almost identical to the facts in *Franks*. In *Franks*, counsel orally amended his motion to suppress in order to challenge the veracity of the affidavit filed in support of a search warrant. In support of the motion, counsel requested the right to call three witnesses. Counsel alleged that two witnesses would testify that “neither had been personally interviewed by the warrant affiants, and that, although they might have talked to another police officer, any information given by them to that officer was ‘somewhat different’ from what was recited in the affidavit.” (*Franks v. Delaware, supra*, 438 U.S. at p. 158.)

Although the starting point in *Franks* begins with a “presumption of validity with respect to the affidavit supporting the search warrant,” (*Franks v. Delaware, supra*, 438 U.S. at p. 171) the Supreme Court also recognized that “a flat ban on impeachment of veracity” would in effect insulate wrongdoing. (*Id.* at p. 168.) “The requirement that a warrant not issue ‘but upon probable cause, supported by Oath or affirmation,’ would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile.” (*Ibid.*)

Franks therefore holds that to “mandate an evidentiary hearing, the challenger’s attack must [1] be more than conclusory and must be supported by more than a mere desire to cross-examine. [2] There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. [3] They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons[, and 4] [a]ffidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. . . . Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or

reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.” (*Franks v. Delaware, supra*, 438 U.S. at pp. 171-172, fn. omitted.)

In this case, counsel’s offer of proof was “more than conclusory and . . . more than a mere desire to cross-examine.” (*Franks v. Delaware, supra*, 438 U.S. at p. 171.) Counsel’s declaration specifically alleged that Prado fabricated interviews with the witnesses detained in the first traffic stop and also misrepresented the facts of Catalano’s interview with Militonayan in the second traffic stop.

In support of the offer of proof, counsel submitted a copy of Finley’s police report and explained that Prado’s interview of the two occupants of the truck detained by Finley never took place. To corroborate the claim, counsel referred to the section of Finley’s police report that documented the fact that he was assisted by Deputy Couey during the traffic stop and failed to make any reference that Prado was also present during the detention. Contrary to Prado’s affidavit that two of the occupants of the truck stated they purchased marijuana from a black man at 32 Sage Brush, counsel’s declaration cited the section of Finley’s report in which Finley stated he interviewed all three of the occupants of the truck and only Nelson admitted that he purchased the marijuana found in the truck from a person who lives in Wagon Wheel.

Regarding the second traffic stop, Prado’s affidavit indicates he relied on Militonayan’s statement to Catalano implicating Johnson. As an offer of proof that Militonayan never implicated Johnson, counsel submitted a declaration from Militonayan signed under penalty of perjury that he never identified Johnson and never stated he purchased the marijuana found in his car from Johnson. Although the trial court dismissed Militonayan’s declaration because he was “clearly [] biased,” counsel also provided the trial court with Deputy Catalano’s police report which corroborates

Militonayan's declaration and contains no statements attributed to Militonayan or anyone else implicating Johnson.

The facts in this case leave little doubt that Johnson made a substantial preliminary showing in the trial court by identifying the specific portions of the affidavit that are alleged to be false and purposefully misrepresented by Prado. Based on the offer of proof, Johnson also made a substantial showing that Prado's actions were deliberately intended to mislead the magistrate as to the material facts that established probable cause. If the proposed false information identifying Johnson is omitted from the affidavit, nothing remains to implicate Johnson and the affidavit would no longer support a finding of probable cause.

At oral argument the district attorney argued the trial court's ruling was also correct because the offer of proof was not based on reliable statements as required in *Franks*. The trial court disbelieved Militonayan's declaration because he was "clearly [] biased," and at oral argument the district attorney argued that counsel's declaration is not reliable because it was made on information and belief and the police reports are not reliable because they are hearsay. According to the district attorney, "the police report itself is not the type of trustworthy information that the Supreme Court requires to be submitted along with counsel's argument in seeking a traversal motion."

Not only do we disagree with the district attorney's reasoning, we are impressed by the irony of their statement that a police report written by a peace officer is not trustworthy enough to be used as an offer of proof in a *Franks* motion challenging the veracity of an affidavit prepared by a peace officer.

Contrary to the district attorney's understanding, the offer of proof in *Franks* is not limited to admissible evidence in a criminal proceeding. *Franks* specifically allows the offer of proof to consist of out-of-court statements offered for the truth of the matter asserted such as an "affidavit[,] or sworn or otherwise reliable statements of witnesses." (*Franks v. Delaware, supra*, 438 U.S. at p. 171.)

An affidavit is defined as a “written declaration under oath, made without notice to the adverse party.” (Code Civ. Proc., § 2003.) Presumably an affidavit is considered reliable because it is made under penalty of perjury, but a police report is just as reliable as an affidavit, if not more so because it provides a certain indicia of trustworthiness. Unlike an affidavit, a police report is generally made at or near the time of the event it describes to ensure accuracy. Police reports are written within the scope of a peace officer’s employment and by officers who have been trained to write police reports. Peace officers write police reports with the knowledge that the accuracy of the report will be relied on by the district attorney’s office to initiate criminal proceedings and request arrest warrants. The police report is also relied on by experts and probation officers, and it is written with the knowledge that the author of the report may be subject to cross-examination under oath challenging the content and accuracy of the report. And similar to the penalty of prosecution for perjury as a consequence to ensure the trustworthiness of an affidavit, Penal Code section 118.1 makes it a criminal offense for a peace officer to knowingly and intentionally include materially false information in a police report.

Consistent with their argument that police reports constitute an insufficient offer of proof, the district attorney also contends that it was incumbent on Johnson to provide the trial court with affidavits from Finley and Catalano or satisfactorily explain their absence. We agree with Johnson on this issue that it is not only unrealistic, but it would have been a futile gesture to ask and expect Finley and Catalano, who are part of the prosecution team, to provide written documentation under penalty of perjury, where there is no compulsion to do so, in order to support the defense contention that the affiant officer lied. Furthermore, we see no difference in the trial court relying on Finley and Catalano’s police reports and relying on their affidavits. In a de novo review, the police reports in this case are “otherwise reliable statements of witnesses” and constitute a sufficient offer of proof.

In a de novo review we also find that Militonnyan's declaration, which was corroborated by Catalano's police report, was a sufficient offer of proof that Prado's affidavit misled the magistrate that Johnson had been identified by Militonnyan. As noted in *People v. Duval* (1990) 221 Cal.App.3d 1105, "the sole testimony of a defendant [is not] in every case, [] insufficient to meet the preliminary showing required by *Franks*. Each case necessarily must be determined on its own facts and circumstances." (*Id.* at p. 1113.)

Disposition

For the foregoing reasons, the petition for a writ of mandate is granted. The superior court is ordered to vacate its order denying Johnson's motion to traverse the search warrant and to conduct an in camera hearing pursuant to *Franks v. Delaware*, *supra*, 438 U.S. 154. The stay previously issued is hereby dissolved. On the court's own motion and for good cause, the clerk shall issue the remittitur forthwith.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

O'LEARY, J.